Supreme Court, U.S.
FILED
FEB 19 1992
OFFICE OF THE CLERK

No. 91-1177

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LYNNE C. CZARNESKI,
Petitioner
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

Supplemental Brief and Appendix to Petition for Writ of Certiorari

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February 17, 1992

After Lynne C. Czarneski filed her Petition for Writ of Certiorari on January 17, 1992, the Ninth Circuit entered a new Order in the case on January 29, 1992, denying Lynne C. Czarneski's Motion to Remand the case back to the Tax Court. A copy of the new Order is included as a supplemental appendix to this supplemental brief. The context of the Ninth Circuit's issuance of the new Order crystallizes why certiorari should be granted in this case.

Lynne C. Czarneski first learned a Tax Court case had been tried against her and a Decision entered against her after her case was on appeal to the Ninth Circuit. Lynne Czarneski then hired separate counsel, who promptly filed a Motion to Remand the case to the Tax Court so that Ms. Czarneski could present an innocent spouse defense under I.R.C. §6013(e). The Ninth Circuit denied the Motion to Remand on January 8, 1991, without stating reasons. The appeal then proceeded to briefing and oral argument, and the Ninth Circuit's opinion of July 26, 1991, is included in the appendix to the original Petition for Writ of Certiorari.

In its opinion of July 26, 1991, the Ninth Circuit declined to address for the first time on appeal Ms. Czarneski's claim for a new trial. *See* appendix to Petition for Certiorari, p. A-7 and A-8, n. 5. The Ninth Circuit also suggested that Ms. Czarneski's remedy is to file a motion with the Tax Court under Tax Court Rule 161 (Motion to Reconsider Findings or Opinion) or Rule 162 (Motion to Vacate or Revise Decision) before attempting to bring the issue to the attention of the Ninth Circuit. *Id.* The Ninth Circuit acknowledged that the filing of the notice of appeal stripped the Tax Court of jurisdiction to decide a Rule 161 or 162 Motion with the Tax Court. *Id.* Nonetheless, the Ninth Circuit stated that Ms. Czarneski should file a Rule 161 or 162 Motion with the Tax Court seeking from the Tax Court an indication of whether the Tax Court would entertain either motion if it had jurisdiction to do so. The Ninth Circuit referred

to the procedure in the federal district courts under Rule 60(b) of the Federal Rules of Civil Procedure where a party seeks relief from "a final judgment, order, or proceeding" after a notice of appeal has been filed. *Id.*

Lynne C. Czarneski responded to the Ninth Circuit's July 26, 1991, opinion in two ways. First, she filed on August 9, 1991, a petition for rehearing and suggestion for rehearing *en banc* arguing, in part, that the Tax Court, as an Article I court, may not possess the equitable powers of a federal district court to give indications about post-trial motions over which the Tax Court admittedly has no jurisdiction to decide. Secondly, in good faith compliance with the Ninth Circuit's opinion, Ms. Czarneski on August 16, 1991 filed both Rule 161 and Rule 162 motions in the Tax Court relating the full situation and asking the Tax Court to give the Ninth Circuit the indications it requested.

The Ninth Circuit denied the petition for rehearing and suggestion for rehearing *en banc*. The Tax Court entered an Order on December 13, 1991, included on pages A46-A48 of the appendix to the original Petition for Writ of Certiorari. The Tax Court stated that because the Tax Court "does not have jurisdiction to exercise the broad common law concepts of judicial power invested in courts of general jurisdiction by Article III of the constitution, we are unable to decide an issue in the context of Fed. R. Civ. P. 60(b)." (citations omitted). A-48. The Tax Court, however, went on to do as the Ninth Circuit ordered and stated that "we are satisfied that an evidentiary hearing by this Court on petitioner's motions would be in order if the Court of Appeals sees fit to remand." *Id.*

Following the favorable Order of December 13, 1991, from the Tax Court, Lynne C. Czarneski then moved the Ninth Circuit for a remand to the Tax Court, all in accordance with the Ninth Circuit's opinion of July 26, 1991. Lynne C. Czarneski filed her Petition for Certiorari on January 17, 1992, while the Motion to

Remand was still pending in the Ninth Circuit. The Ninth Circuit then issued its new Order of January 29, 1992, denying remand for the second time.

The effect of the Ninth Circuit's rulings is to let stand a Decision against Lynne Czarneski that even the Tax Court, by virtue of its Order of December 13, 1991, recognizes is worthy of review by an evidentiary hearing on the issue of whether the Tax Court trial was conducted in violation of I.R.C. §§7452 and 7453, Tax Court Rule 201(a), ABA Rule 3.7, and Lynne Czarneski's due process rights, enabling her to present an innocent spouse defense under IRC §6013 (e). This Court should grant certiorari to clarify the law that an appellate court may consider Ms. Czarneski's due process claim for a new trial in this situation and to exercise this Court's supervisory power to preserve the integrity of both the Tax Court's and the Ninth Circuit's judicial process.

February 17, 1992

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LYNNE C. CZARNESKI,
Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,
Appellee.

No. 90-70444
ORDER

Before: REINHARDT and FERNANDEZ, Circuit Judges.

The motion of appellant, Lynne Czarneski, to remand this case to the Tax Court is hereby DENIED without prejudice to her pursuing her rights, if any, before the Tax Court. It is noted that this court's mandate issued on November 4, 1991.

Filed Jan. 29, 1992
Cathy A. Catterson, Clerk
U.S. Court of Appeals